FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 559

REPUBLIC AVIATION CORPORATION, a Corporation,

and

LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,
Petitioners,

v.

SAMUEL S. LOWE, Deputy Commissioner of the United States Employees' Compensation Commission, Second Compensation District,

and

AIDA M. PARKER,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOHN P. SMITH,
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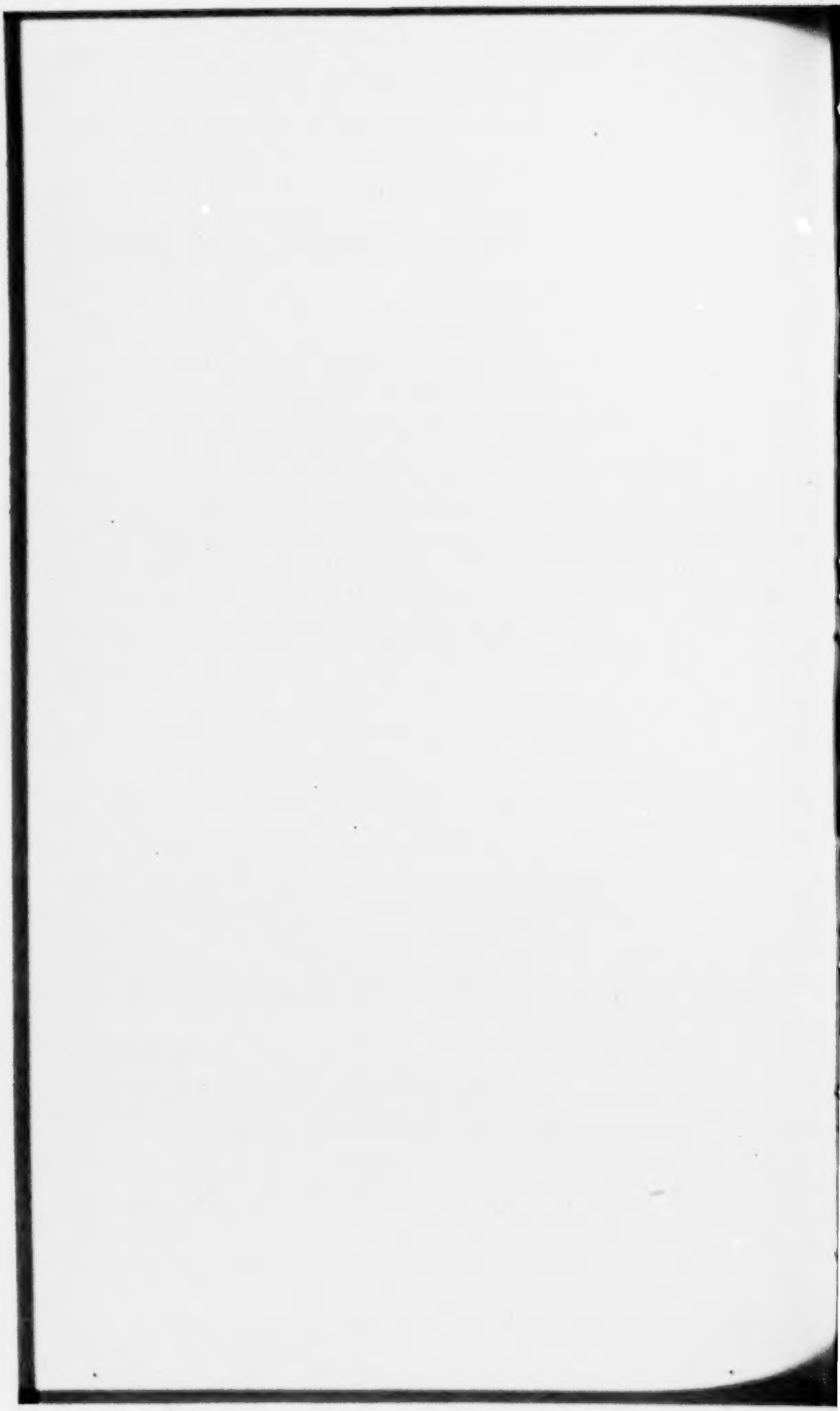

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Republic Aviation Corporation, a Corporation, and Liberty Mutual Insurance Company, a Corporation, respectfully petition this Honorable Court to issue a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit in the above

entitled case entered November 6, 1947 (R. 118)* affirming an order and judgment of the United States District Court for the Southern District of New York.

A

Summary Statement of Statutes Involved, Prior Proceedings and Facts of the Case

Statute

This case involves the construction and interpretation of the "Defense Bases Act," 42 U. S. C. 1651-a, 1 and 4.

A brief history of this legislation is worthy of note.

Shortly prior to the enactment of the first Defense Bases Act (August 16, 1941) the United States had acquired lend-lease bases upon which it intended to construct permanent air, naval and military installations. This construction contemplated the erection of new buildings, fortifications, housing, roads, etc. To accomplish that purpose, it was necessary to enlist laborers and workmen from all parts of the United States to do the carpentry, masonry, plumbing, electrical and kindred construction work. One of the most cogent factors motivating the enactment of the Defense Bases Act was the necessity of providing a uniform system of workmen's compensation for the above described workmen from the continental United States. Many of the native states of these workmen had compensation statutes that were inadequate to deal with accidents occurring outside the state. It was the Government's experience that difficulty was encountered in securing workmen unless some provision was made for compensation benefits to them in the event of injury.

There is nothing, in either the Congressional Record or committee reports, to indicate a legislative intent to force

* Reference throughout is to page numbers of record on appeal in C. C. A. below.

within the coverage of the Defense Bases Act, such highly specialized professional technicians as Joseph Parker and the Republic Service Contract under which he operated. The purpose and intent was rather directed to workmen working for contractors engaged in the construction of military installations on the lend-lease bases. The original act, Public Law #208, 55 Stat. 622 in so far pertinent read

> "That except as herein modified, the provisions of the Act entitled 'Longshoremen's and Harbor Workers' Compensation Act,' approved March 4, 1927 (44 Stat. 1424), as amended, and as the same may be amended hereafter, shall apply in respect to the injury or death of any employee engaged in any employment (at any military, air or naval base acquired after January 1, 1940, by the United States from any foreign government) or any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, irrespective of the place where the injury or death occurs."

After the entry of the United States into World War II it was necessary to give the Defense Bases Act, a world-wide geographical application and it was for that reason the Defense Bases Act was amended in December, 1942. The need for compensation coverage at the original lend-lease bases had not ceased, however, because construction work was still proceeding at those bases. In the 1942 amendment, therefore, Congress retained the coverage for the lend-lease bases by incorporating the precise words from the 1941 legislation into the 1942 amendment and numbered it subdivision 1. Thus the geographical coverage afforded for the lend-lease bases by the 1941 legislation was retained in the 1942 statute. The wider geographical scope that prompted the passage of the 1942 amendment was affected not by changing the words or intention of subdivision 1 but rather by adding subdivisions 2, 3 and 4

which are not found in the original 1941 statute. Title III of Public Law 784, December 2, 1942, 56 Stat. 1035 42 U. S. C. 1651 read in so far as material as follows:

> "That (a) except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act,—shall apply in respect to the injury or death of any employee engaged in any employment—
>
> (1) At any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government
>
> (2) (not material)
>
> (3) (not material)
>
> (4) under a contract entered into with the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), or any subcontract, or subordinate contract with respect to such contract, where such contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1), (2), and (3) of this subdivision, for the purpose of engaging in public work, * * * irrespective of the place where the injury or death occurs. * * *"

Prior Proceedings

Respondent Deputy Commissioner, Samuel S. Lowe, awarded death benefits to Aida M. Parker as widow (R. 8-10) deciding that her claim fell within the Defense Bases Act 42 U. S. C. 1651-(a) (4) (R. 9, 21).

Pursuant to 33 U. S. C. 921 petitioners instituted a suit in the United States District Court, Southern District of New York to set aside the aforesaid award (R. 3-7).

On respondents' motion for summary judgment (R. 12-13) (under Federal Civil Rule 56-b) the said District Court dismissed petitioners' complaint and rendered final judg-

ment for respondents; deciding that the Deputy Commissioner was correct in finding the said claim fell within 42 U. S. C. 1651-(a) (4) (R. 103).

On petitioners' appeal to the United States Circuit Court of Appeals, Second Circuit, the District Court judgment was affirmed (R. 118). The Circuit Court, however, decided the claim fell within Section 1651-(a) (1) and specifically did not consider the question of whether the claim fell within Section 1651-(a) (4) as had been decided by the Deputy Commissioner and the District Court.

Facts

In order to properly service and secure the best performance from aircraft supplied to the United States Government by the Republic Aviation Corporation (referred to throughout as Republic), the War Department and Republic entered into a service contract under the terms of which Republic agreed to furnish the services of its aircraft technicians to the Army Air Forces wherever requested.

This contract was dated October 29, 1943 marked in evidence as Carrier's Exhibit 1 (R. 26). The exhibits are reprinted at R. 37-85.

After the Allied Armed Forces invaded the Pacific Island of Ia Shima, a technical problem arose as to how to fly the then new Republic P-47, long range fighter plane to obtain its maximum efficiency (R. 29). To solve this problem, the United States Army called upon Republic to perform under its aforesaid service contract and accordingly, Joseph F. B. Parker, employed by Republic as a test pilot and technician, was on August 4, 1945 sent by Republic from its plant at Farmingdale, New York, to Ia Shima (R 25). His salary and expenses of transportation were charged to the service contract, Carrier's Exhibit 1 (R. 28).

On August 20, 1945, while engaged in attempting to solve the technical problem which brought him there, Parker was killed in a test flight take off from Ia Shima in a Republic P-47 (R. 28).

B

Jurisdiction

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered November 6, 1947 (R. 119). The jurisdiction of this Court is invoked under its Rule 38 (5b) and Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (28 U. S. C. 347 (a)).

C

Questions Presented

1. What is the scope and meaning of the term "public work" as defined in the Statute (42 U. S. C. 1651-b) and was the service contract between the United States Government and Republic dated October 29, 1943 a contract for public work within the statutory definition?

2. What is the scope and meaning of the term "acquired" as used in the Statute (42 U. S. C. 1651-a-1) and was Ia Shima acquired by the United States within the meaning of the statute?

3. Since the only question litigated at the trial was whether the contract between the Government and Republic was a "public work" contract, within Subdivision a-4, and no evidence introduced on the issue of whether Ia Shima was "acquired" within the meaning of Subdivision a-1, was it error for the Circuit Court to sustain the award on the theory that Ia Shima was acquired within Subdivision a-1?

D

Reasons Relied on for the Allowance of the Writ

1. The Circuit Court of Appeals below has decided herein an important question of federal law which has not been, but should be, settled by this Court. (United States Supreme Court General Rule 38, (5) (b) *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285.)

2. The case at bar is of great general importance and relates to the construction and effect to be given the Defense Bases Act, 42 U. S. C. 1651 *et seq.*, the interpretation of which has never been passed upon by this Court.

> *Canadian Aviator, Ltd.* v. *United States*, 324 U. S. 215, 216.

3. The construction to be given the Defense Bases Act is of paramount importance to all employees working outside the continental limits of the United States for employers under contracts with the United States Government. Since the contracts between the employers and the United States Government are "cost-plus fixed fee contracts," the United States Government and in turn each and every taxpayer in the country is affected by the construction to be given the Defense Bases Act. The question presented is sufficiently important therefore to call for an exercise of this Court's power of supervision over this case.

4. The judgment of the Circuit Court of Appeals herein appealed from results in a substantial denial of justice to the employer and carrier, petitioners. At the beginning of the trial, the Deputy Commissioner, on behalf of himself and the claimant Aida Parker, expressed a belief (R. 21) that "the instant case is within the scope of the Act and particularly within the scope of subdivision 4 which relates to public work." The Deputy Commissioner further read into the record (R. 21, 22, 23) the adminis-

trative interpretation given the term "public work" by the War and the Navy Department of the Government.

As a consequence the only evidence offered at the trial dealt solely with the question of whether petitioner Republic's contract with the Government was a public work contract. The question of whether Ia Shima was acquired was never litigated.

By sustaining the award on the ground that Ia Shima was acquired within the meaning of subdivision a-1, the Circuit Court of Appeals below has decided this case on a ground that was never litigated and upon which no evidence whatever was introduced.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all proceedings in the case numbered and entitled on its docket, #20645, Republic Aviation Corporation and Liberty Mutual Insurance Company, plaintiffs-appellants v. Samuel S. Lowe, Deputy Commissioner of the United States Employees' Compensation Commission, Second Compensation District and Aida M. Parker, defendants-appellees, and that the judgment therein of said United States Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

REPUBLIC AVIATION CORPORATION AND LIBERTY MUTUAL INSURANCE COMPANY

By: JOHN P. SMITH
ALBERT P. THILL,
Counsel for Petitioners.

IN THE

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions Below

The opinion of the United States District Court for the Southern District of New York was rendered December 10, 1946 (R. 86-105) and is reported in 69 F. Supp. 472.

The opinion of the United States Circuit Court of Appeals for the Second Circuit was rendered November 6, 1947 (R. 113-118) and is reported in 164 F. 2nd 18.

II

Statement of the Case

A statement of the facts and questions involved herein will be found in the petition for writ of certiorari (*supra*).

III

Specification of Errors

The United States Circuit Court of Appeals for the Second Circuit erred:

1. In affirming the judgment in favor of respondents rendered by the United States District Court for the Southern District of New York;
2. In holding that Ia Shima was "acquired" by the United States.
3. In sustaining the award of the Deputy Commissioner on a ground which was not litigated and on which the record contains no evidence.

IV

Summary of the Argument

POINT 1. The questions involved, concerning the interpretation of a Federal Statute are of substantial general importance and should be passed upon and settled by this court.

POINT 2. The Circuit Court of Appeals below erroneously held Ia Shima was "acquired" by the United States and in any event decided the case on a theory not litigated and on which the record contains no evidence.

POINT 3. The contract between Republic and the Government was not a contract for public work; this claim is therefore not within 42 U. S. C. 1651-a4.

POINT I

Research shows this Court has never passed upon or interpreted any part of the Defense Bases Act (42 U. S. C. 1651, *et seq.*).

It is of utmost importance to employees and their dependents, employers and the Government that this Court authoritatively speak on the question.

The employees affected, in many cases, come from States having workmen's compensation statutes with extra territorial jurisdiction. Until this Court speaks, employees and their dependents will be forced to guess whether their claims are to be made under the State Workmen's Compensation Statutes or under the Federal Defense Bases Act.

Employers are in precisely the same predicament. Until this Court decides just where the local State Statutes end and the Federal Statute begins, employers are never justified in voluntarily accepting and paying compensation benefits. Regardless of whether the claim is brought in the State tribunal or under the Federal Statute, it must be resisted since it would be voluntarily accepted at the peril of the employer and his carrier.

In fact, petitioner Liberty Mutual is faced with two other claims presently pending in the Supreme Court of New York, Appellate Division, Third Department.

The contract between Republic and the Government was a "cost-plus fixed fee" contract. If Republic and its carrier Liberty Mutual Insurance Company voluntarily accepted a claim under either State or Federal jurisdiction which later court decisions determine to be the wrong tribunal, the Government would not and could not reimburse Republic and its carrier for the erroneous acceptance and payment of the claim.

The Government is wholly unable to calculate and keep current the cost of its far flung defense bases construction projects.

If, however, this Court exercises its power to review this decision and authoritatively speaks on the subject, the reciprocal rights and obligations of all the above enumerated people will be understood and accepted thus avoiding endless and costly litigation.

A decision on this question will constitute "a precedent of general application." *DelVecchio* v. *Bowers*, 296 U. S. 280, 285.

POINT II

The Circuit Court of Appeals below decided that Ia Shima had been "acquired" by the United States and that this claim, therefore, fell within 42 U. S. C. 1651 (a) (1).

It is respectfully submitted such was error.

The word "acquired" is defined in Funk and Wagnall's New Standard Dictionary as

> "to obtain by search, endeavor, practise or purchase; get as one's own."

The Century Dictionary and Cyclopedia defines the word acquire as follows:

> "to get or gain, the object being something which is more or less permanent, or which becomes vested

or inherent in the subject; a mere temporary possession is not expressed by acquire but by obtain, procure, etc."

Words used in a statute are to be given their ordinary, obvious and rational meaning. *Bozar* v. *Central Pa. Quarry*, 73 F. Supp. 803.

The ordinary every day meaning as well as the dictionary meaning of the word acquired carries with it a note of some degree of lasting permanence. There is no necessity of delving into the international law, technical definition of the word acquire to reach its common accepted and understood meaning. See C. C. A. opinion (R. 116-117).

A thing is not acquired when the clear unambiguous intent is to merely use it temporarily, to serve a temporary need, and when the immediate need is terminated to dispose of the thing.

Helvering v. *San Joaquin Co.*, 279 U. S. 496;
Commissioner of Insurance v. *Broad Street Mutual Casualty Co.*, 312 Mass. 261; 44 N. E. 2d. 683;
Clarno v. *Gamble-Robinson Co.*, 251 N. W. 268, 190 Minn. 256;
Parker v. *Schrimsher*, 172 S. W. 165 (Tex. Civ. App.);
In re: Okahara, 191 Cal. 353, 216 P. 614;
1 Corpus Juris Secundum 918.

To say that the United States "acquired" Ia Shima logically requires a holding that the United States also acquired parts of North Africa, Italy, France, Germany, Holland, Belgium, China and many other parts of the world.

The fact is, however, all the United States did was to use those various far flung lands as temporary bases from which to project the war effort further and to its final con-

clusion. When security dictated the United States withdrew its troops and equipment as soon as it was practical from these foreign lands and eventually intends to dispose of all of them on some basis, the exact details of which are not now clearly known in all cases.

Concededly the language of Section 1651 (a) (1) as contained in the original act of August 16, 1941 applied only to the British Lend Lease Bases. Although there may have been no formal transfer of sovereignty of those British bases, there nevertheless is a substantial note of permanence to the transfer from Britain to the United States. It is the intention of the United States Government to permanently use those bases, so close to our Atlantic coast, on a continuous long term basis. Regardless of the fact that there had been no transfer of sovereignty sufficient to satisfy the international law requirement of acquired territory (*Fleming* v. *Page* 9, How. 603), there was nevertheless a definite difference between the circumstances surrounding the British bases and such far flung territory as Ia Shima, North Africa, Italy, etc.

In any event the Record on Appeal is absolutely silent on the issue of what troops took over Ia Shima, the intent of the Government in so doing, how long the troops remained and what happened to Ia Shima after the troops left. The answers to all these questions are necessary to determine whether in fact Ia Shima was actually "acquired," and the Circuit Court's opinion is, therefore, predicated on pure speculation rather than on actual evidence. For the Circuit Court of Appeals to thus base this case on a theory different from that on which it was tried and concerning which there is no evidence in the record, was error.

Helvering v. *Gawran*, 302 U. S. 238;
Peck v. *Heurich*, 167 U. S. 624;
Publicity Building Realty Corp. v. *Hannegan*, 139 F. 2nd 583;
Spann v. *Commer Std. Ins. Co.*, 82 F. 2nd 593.

POINT III

The contract between Republic and the Government was not a contract for Public Work; therefore this claim is not within 42 U. S. C. 1654 (a) (4).

The respondent Deputy Commissioner as well as the United States District Court below held that the claim herein fell within 42 U. S. C. 1651 (a) (4). Such was error.

The Circuit Court of Appeals below did not follow that holding (sustaining the award on 42 U. S. C. 1651 (a) (1)), and although the reasons why such a holding constituted error were briefed at length in the Circuit Court of Appeals below, the same will be presented in summary here.

It is axiomatic that where legislation defines a term used in a statute, Courts are bound by that definition.

Fox v. *Standard Oil Co.*, 294 U. S., 87, 95.

The Legislature included in the Defense Bases Act a definition of public work as follows (42 U. S. C. 1651 b).

> "Any *fixed improvement* or any *project*, involving *construction, alteration, removal* or *repair* for public use of the United States or its Allies, including but not limited to *projects* in connection with the war effort, dredging, harbor improvements, dams, roadways and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project." (Italics ours.)

The respondents contended in the Courts below that Congress intended to include within that definition all types of work in connection with the war effort.

It is submitted, however, if such was the purpose and intent of the legislators, they could have very simply said so. Instead, they included the above, lengthy, precise, par-

ticularized definition of the type of public work the legislation was intended to cover. By specifying that the work covered must involve a fixed improvement or construction, alteration, removal or repair in connection with the war effort, they designated the type of work in connection with the war effort to be included. Therefore, any work not within the specific or similar classifications enumerated in the statutory definition was excluded therefrom. The services of a test pilot was not one of the species of work set forth in the statutory definition.

This legal principle of *ejusdem generis* in statutory construction is illustrated by the following cases.

Hodgson v. *Mountain and Gulf Oil Co.*, 297 Fed. 269, affd. 20 F. 2d 1022;
In re Bush Terminal, 93 F. 2d 659;
Lyman v. *Commissioner of Internal Revenue*, 83 F. 2d 811;
People v. *Ryan*, 274 N. Y. 149.

Wholly apart from the *ejusdem generis* rule of construction above, which excludes Parker and Republic's contract from 42 U. S. C. 1651 (1) (4), there is a further and equally cogent reason for so doing, *i.e.*, the distinction between "work" and "services."

Nowhere in the Defense Bases Act or its legislative history is there any indication of an intention to include "services" within the definition of the word "work." Throughout the statute under consideration, the words "project" and "work" are universally used; the word "services" is conspicuous by its absence. It must be assumed that when Congress used the word "work" in the statute, it was using that word in its generally understood meaning.

Webster's Dictionary of the English language (World Publishing Company, 1940), page 1983, defines the transi-

tive verb "work" as "to bestow labor, toil or exertion upon." However, when we examined the Republic contract in question which the Government contended was within the scope of the Defense Bases Act, we find that instead of referring to "work," "workmen" and "project" as does the statute, the contract rather uses the words "services" and "technicians" and is referred to throughout as a "service contract."

The record further reveals that the operation called for by the contract, and in which Parker was engaged, required the highest degree of skill and engineering ability and probably could not have been performed by more than a relatively few men in the entire world at that time. The Republic P-47 was then a new model airplane (R. 29) which at that time could be handled by but a very few men in Republic's employ and out of that few, General Kenny specifically requested that Parker be sent to the Far East to solve the problem of adapting the P-47 to conditions at Ia Shima (R. 25-29). Joseph Parker was literally the one man in the world upon whom the United States Government could rely to accomplish that feat. To say that Joseph Parker was engaged in "work" and that the contract under which he operated was a "work" contract is to use that word in a much broader sense than is recognized by dictionary definition, statutory definition, common usage and legal authority.

This distinction between "public work" and "expert services" has been recognized by every jurisdiction that has had occasion to pass upon the question and no exceptions have been brought to light by the research of counsel.

Employers Casualty v. *Steward Abstract Co.*, 17 S. W. (2d) 781;
Swanton v. *Corby*, 38 Cal. A. (2d) 227;
People v. *Flagg*, 17 N. Y. 584;
Heston v. *Atlantic City*, 93 N. J. L. 317;
Braatan v. *Olson*, 28 N. D. 235, 148 N. W. 829;

Cross v. *State*, 198 Ind. 323, 152 N. E. 822;
Johnson-Olmstead Realty Co. v. *Denver*, 89 Colo. 250, 1 P. (2) 928;
Rollins v. *Salem*, 251 Mass. 468, 146 N. E. 795;
Krohnberg v. *Pass*, 187 Minn. 73, 244 N. W. 329;
Cudell v. *Cleveland*, 15 Ohio C. C. N. S. 374;
Stratton v. *Alleghany County*, 245 Pa. 519, 91 A. 894;
State v. *Brown*, 159 Tenn. 591, 21 S. W. (2) 721;
Neal v. *Bd. of Educ.*, 40 N. H. 13, 52 P. (2) 614;
Flottum v. *Cumberland*, 234 Wis. 654, 291 N. W. 777;
Potts v. *Utica* (C. C. A. 2), 86 F. (2) 616;
Newport News v. *Potter*, 122 Fed. 331;
Jeffersontown v. *Cassin*, 267 Ky. 562, 102 S. W. (2) 1001.

IV

CONCLUSION

This case warrants the exercise by this Court of its supervisory powers in that the questions here involved may be permanently settled by this Court and a proper construction and interpretation made of the Defense Bases Act, and that to such an end a writ of certiorari should be granted and this Court should reject the decision of the United States Circuit Court of Appeals for the Second Circuit and finally reverse it.

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